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No. 88-219

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MANNHEIM BOOKS, INC.,

Appellant,

v.

THE COUNTY OF COOK, ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

MOTION OF APPELLEE COUNTY OF COOK TO AFFIRM

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QUESTION PRESENTED

Whether a County zoning ordinance is consistent with this Court's holding in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986) and the First Amendment, where the ordinance merely regulates the location of sexually oriented businesses, permitting them to locate without restriction in industrial zones which comprise 5.7% of the County's total land area and which provides a myriad of suitable locations for adult businesses.

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The appellee County of Cook, Illinois, respectfully moves to affirm the judgment of the Supreme Court of Illinois on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

The County of Cook, appellee herein, instituted this case in the trial court to enforce its zoning ordinance by seeking to enjoin Mannheim Books, Inc. (and four additional adult businesses whose cases were consolidated for trial) from operating sexually oriented adult businesses in violation of the County's zoning ordinance. The County of Cook is a home rule county pursuant to the 1970 Illinois Consti-

tution, art. VII, section 6(a), with zoning jurisdiction over widely scattered unincorporated areas of the county. Cook County is the most populous county in Illinois and is predominantly composed of incorporated municipal jurisdictions including the City of Chicago, each having independent zoning authority within their own borders.*

Mannheim Books, Inc., the appellant herein, is an adult bookstore which sells and exhibits sexually explicit books, magazines, paraphernalia, video tapes and movies. Appellant's business is located in unincorporated Cook County in a commercial zone where adult businesses are not permitted. The properties abutting the appellant's businesses to the north, west and across the street to the east are all zoned for residential uses. At the trial, appellant contended that because Cook County's ordinance permitted adult businesses only in industrial zones, the ordinance was unconstitutional in violation of the First Amendment.

A trial was conducted on the very question now on appeal, namely whether the industrial zones in unincorporated Cook County provide a sufficient number of suitable locations for sexually oriented businesses so as not to suppress access to First Amendment protected speech. The trial court held that the County's ordinance provided ample suitable locations for adult businesses and on March 8, 1985, entered an order enjoining the defendants from continued violation of the County's ordinance. The Illinois Appellate Court reversed, finding that industrial zones do not provide reasonable access for adult speech. *County of Cook v. Renaissance Arcade, et al.*, 150 Ill. App. 3d 6, 501 N.E.2d 133 (1986). Cook County appealed the deci-

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* The Village of Franklin Park, a municipal unit of local government having village boundaries located within a block of the appellant's adult bookstore, intervened as a plaintiff in this case prior to trial.

sion to the Supreme Court of Illinois which affirmed the trial court based on this Court's recent decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986), holding that Cook County's ordinance provides reasonable alternative locations for adult speech so as not to deny adult businesses an opportunity to open and operate in unincorporated Cook County. *County of Cook v. Renaissance Arcade, et al.*, 122 Ill. 2d 123, 522 N.E.2d 73 (1988).

The Evidence

Expert witnesses for plaintiffs and defendants visited each of the County's 78 industrial zones, land areas which total 10.8 square miles, comprising 5.7% of the land area in unincorporated Cook County. (C. R2321-2315, 3053)* The County's witness, an expert in real estate appraisal and development, identified numerous industrial sites throughout the County which he concluded would be suitable for adult businesses. Among the criteria which he considered were the sites' proximity to population centers and accessibility from major roadways. (C. R3300) This witness opined that vacant land was suitable for adult businesses because suitable structures could be built within a short time. (C. R3344-3345) An urban geographer also testified on behalf of the County as to the results of a license plate market study he conducted to determine the extent of the geographic market area for the defendants' adult businesses. (C. R3459-3464) Based on that study he determined the market area to be a twenty mile radius around the adult businesses. (C. R3465)

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* "C. R____" refers to the certified record on appeal filed with the Illinois Supreme Court.

The defendants' expert, also an urban geographer surveyed the industrial sites to determine if any were suitable for adult businesses. He testified that his survey automatically excluded any site if it was vacant or if it was not posted for sale or rent, because an attorney for the defendants had instructed him that such sites were unsuitable as a matter of law. (C. R2808, 2751) On reconsideration, he conceded that if an available pre-existing structure was not legally required for a site to be suitable, then several of the sites surveyed would be good locations for adult businesses. (C. R2812-2813, 2820, 2823-2829, 2842-2851) The defendants' expert further testified that his professional experience was preparing market studies and siting studies for grocery stores and health care facilities. (C. R2761) He stated that in this case he had not studied or otherwise obtained information on the effect of location in industrial zones on the operation of an adult business. (C. R2962) He further admitted that he performed no studies and had no specific knowledge about the economics of an adult business (C. R2559, 3074), nor what kind of building would suit the needs of an adult business. (C. R2961) While this witness believed that industrial locations would diminish the market for adult businesses (C. R2637), he conceded that customers would likely travel farther to patronize adult businesses than to a non-adult business. (C. R2853-2859)

ARGUMENT

ZONING SEXUALLY ORIENTED BUSINESSES INTO INDUSTRIAL ZONES DOES NOT DENY A REASONABLE OPPORTUNITY FOR SUCH BUSINESSES TO OPEN AND OPERATE UNDER *RENTON*, AND THE DECISION UPHOLDING THE ORDINANCE SHOULD BE AFFIRMED.

The Illinois Supreme Court's decision upholding Cook County's zoning ordinance is consistent with this Court's holding in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986), and raises no substantial questions not previously presented and decided by this Court in the *Renton* decision. For that reason alone, this appeal should be dismissed and the decision of the Illinois Supreme Court should be affirmed.

Appellant asserts that the Illinois Supreme Court erred by recognizing Cook County's 78 industrial zones as providing reasonable locations for selling and exhibiting sexually oriented materials and entertainment. The appellant contends that industrial zones are an unreasonable alternative because they are "commercially impractical" and "economically unfeasible" for the operation of an adult business. (J.S. 8)* Moreover, the appellant contends that industrial zones are unreasonable *per se* as locations for adult businesses. These contentions are refuted both by this Court's holding in *Renton* as to the applicable law, and by the extensive factual record of this case. Appellant has simply failed to assert any questions which can be supported by the record or which this Court has not previously decided.

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* "J.S. ___" refers to Jurisdictional Statement of the appellant.

The First Amendment requires only that local government refrain from effectively denying a reasonable opportunity for an adult business to open and operate. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 932 (1986). In *Renton*, adult theater owners made nearly identical arguments to those made herein, contending that the 520 acre set aside area where the City of Renton permitted adult theaters to locate, provided no commercially viable locations. *Renton*, 452 U.S. at 53-54, 106 S.Ct. at 932. Theater owners contended that the set aside zone in the City of Renton was not truly available because the land was either vacant or substantially occupied by a sewage disposal site and treatment plant, a horseracing track, a business park suitable only for industrial uses, a warehouse and manufacturing facility, an oil tank farm and a fully developed shopping center. *Playtime Theater, Inc. v. City of Renton*, 748 F.2d 527, 534 (1984). This Court rejected the argument and expressly refused to condition the reasonableness of alternative sites on the question of commercial viability stating that: "The inquiry for First Amendment purposes is not concerned with economic impacts." *Renton*, 475 U.S. at 54, 106 S.Ct. at 932, citing *Young v. American Mini Theaters*, 427 U.S. 50, 78, 96 S.Ct. 2440, 2456 (1976).

Despite this Court's express refusal to consider economic impact as a relevant factor for First Amendment inquiry, the appellant contends that industrial sites in unincorporated Cook County should be found to be *per se* unreasonable for adult bookstore and adult use locations because they are "economically unfeasible" and "commercially impractical." (J.S. 8) This argument was rejected in *Renton*, and otherwise cannot be sustained in light of the record of this case. Even if this Court were persuaded to reconsider the question of economic impact as a test to determine whether First Amendment rights have been vio-

lated, the record of this case is devoid of any evidence on which to make a finding that adult businesses would suffer adverse economic impacts as a result of Cook County's ordinance. The appellant's own witness testified that he had not studied the economic effect of industrial locations on the operation of adult businesses. (C. R2962) Moreover, the appellant's witness testified that he had no knowledge of the economics or other operating criteria for an adult business such as building needs (C. R2961); or how much traffic volume was necessary to generate clientel (C. R2959-2960); nor did he otherwise study any location criteria to determine the location requirements of an adult business. (C. R2958) He conceded however that an adult business customer would likely travel farther to patronize an adult business than to a non-adult business. (C. R2857-2859) This opinion was confirmed by a market study of the defendants' customers which determined that the market area for the defendant adult businesses was as large as a 20 mile radius. (C. R3465) No other evidence on the question of economic impact was introduced to show negative impact on adult businesses.

Extensive evidence however does demonstrate the suitability of numerous Cook County industrial locations as sites for adult businesses. The County's expert testified that in his opinion, a site was suitable if it was in proximity to a population density, if it was accessible from major roadways, and if the site was physically capable of development. (C. R3300) He did not consider the lack of municipal water supply or sewers a barrier because private wells and septic systems are common in unincorporated areas (C. R3343); nor did the County's expert believe that the zoning classification of "industrial zone" impaired commercial development, noting that many retail/commercial uses are permitted in Cook County's industrial zones. (C. R3308-3309) The County's expert identified nu-

merous sites throughout the unincorporated county, which in his opinion satisfied these criteria. (C. R3233-3283) The appellant's own expert witness conceded that a number of these industrial sites would be suitable for adult businesses. *County of Cook v. Renaissance Arcade, et al.*, 122 Ill. 2d 123, 138, 522 N.E.2d 73, 79 (1988) (wherein the Illinois Supreme Court recognized this testimony as supporting the trial court's finding that a sufficient number of suitable sites were available).

The facts of this case thus compare with remarkable similarity to those presented in *Renton*, wherein a substantial portion of Renton's permissively zoned area was either vacant or developed with industrial uses, including a sewage treatment facility, oil tank farms, and manufacturing plants. See e.g., *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 534 (1984). Nonetheless, this Court found that Renton's ordinance permitted adult theaters in 5% of the city's land areas and held that this quantity of land which included the vacant land and industrially developed land, provided adult theaters with a reasonable opportunity to open and operate. *Renton*, 475 U.S. at 54, 106 S.Ct. at 932.

The practical effect of the Renton ordinance and Cook County's ordinance is nearly identical. Both permit adult businesses to purvey sexually oriented materials freely, limiting only the location of operation. No restrictions are placed on the content of the materials purveyed and no limitations are placed on the number of permitted businesses. If a market exists for sexually explicit materials and entertainment, no evidence has been offered in this case to show that appellant's First Amendment rights will even be grazed by the ordinance's location requirement where the evidence shows that a sufficient number of suitable sites exist.

Thus, the contention that Cook County's industrial zones are commercially impractical or economically infeasible for adult businesses is nothing more than total speculation by the appellant and is plainly refuted by the evidence presented. There is simply no precedent cited by the appellant to support the contention that economic impact should be considered. Thus even if this Court were to re-examine *Renton* and *Young*, and consider the appellant's question, the appellant has failed to provide this Court with sufficient evidence on which to grant them favorable relief. The appellant's further contention, that it was error for the Illinois Supreme Court to find that Cook County's ordinance provides a reasonable number of suitable sites, because in appellant's view, land zoned industrial is by definition ill-suited (J.S. 8), is likewise without precedent. By so arguing, appellant is apparently urging this Court to adopt a rule finding industrial land to be *per se* unsuitable as alternative locations for adult businesses. Such a rule however would be legally and factually inconsistent with *Renton* and also contrary to the factual finding of the trial court in this case.

Per se exclusion of industrial zones as alternative locations for sexually oriented businesses would severely impair the ability of local government to tailor solutions to the problems associated with accommodating such businesses, in that industrial zones are often the only zoning districts which are not located in close proximity to residential areas or other family oriented land uses. This Court has stated that cities must be given an opportunity to experiment with solutions to the admittedly serious problems created by adult businesses, and that so long as a reasonable opportunity to open and operate is afforded to such businesses, the First Amendment is satisfied. *Renton*, 475 U.S. at 54, 106 S.Ct. at 932.

Cook County's zoning authority over the unincorporated areas of the County necessitates unique consideration of the land use patterns in the many municipalities which comprise the majority of the County. Permitting adult businesses to locate only in industrial areas, provides such businesses with ample opportunities to open and operate, while at the same time buffers the surrounding communities from the adverse secondary effects associated with adult businesses. The facts of this case clearly demonstrate that irrespective of the zoning nomenclature designating areas where sexually oriented adult businesses may locate as "industrial", many sites are available which are not occupied by industry and which are otherwise suitable for establishment of an adult business.

The Illinois Supreme Court held that Cook County has provided adult businesses with reasonable opportunities to open and operate their businesses, and that the County's zoning ordinance is constitutional. That decision is consistent with *Renton*, and should be affirmed.

CONCLUSION

Wherefore, the Appellee moves this Court to affirm the judgment entered in this cause by the Supreme Court of Illinois.

Respectfully submitted,

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